SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
APR 7 1967
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1140

NATIONAL SURETY CORPORATION,
Petitioner,

v.

RAUSCHER, PIERCE & CO., INC.,
Respondent.

On Petition For A Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

PAUL CARRINGTON,
FLETCHER L. YARBROUGH,
Attorneys for Respondent.

CARRINGTON, JOHNSON & STEPHENS,
1900 Mercantile Dallas Building,
Dallas, Texas 75201,
Of Counsel.

WARLICK PRESS, INC.—P. O. BOX 10543—2263 VALDINA STREET—DALLAS—NE 1-3130

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statement	2
Argument	11
I. The Decision Of The Court Of Appeals Is Clearly Correct On Grounds Wholly Unrelated To The Points Sought To Be Raised By The Petition for Writ of Certiorari	11
A. The Court of Appeals' Affirmance of the Award of Attorneys' Fees and Court Costs Was Clearly Correct, and Is Unchallenged by the Petition for Writ of Certiorari	12
B. The Court of Appeals Was Correct in Affirming the District Court's Award of Rauscher, Pierce's Losses and in Affirming the Declaratory Judgment Awarded, on the Basis of Its First Group of Causes of Action, Which Is Unchallenged by the Petition for Writ of Certiorari	14
C. The Decision of the Court of Appeals in Overruling National Surety's "Net Profits" Point Was Correct on Gounds Which That Court Did Not Reach	16
II. The Decision of the Court of Appeals Was Correct Upon the Gounds Upon Which It Relied and Which Are Attacked By the Petition For Writ of Certiorari	19
A. Contrary to Petitioner's Points 1 and 2, There Were Findings of Fact In the District Court to Support the Decision of the Court of Appeals, and Those Findings Were Supported By Ample Evidence In the Record, on the Question of Loss Suffered by Rauscher, Pierce as the Result of Fraudulent Representations to it by Volz	19

Page

B. There Is No Conflict Between the Decision of the Court of Appeals and the Law of the State of Texas 25

III. The Matters Raised by Petitioner's Points, If Reached By This Court On The Merits, Are Of No Importance Beyond The Present Litigation And Are Essentially Matters of Fact 27

Conclusion 28

Signatures 28

Certificate of Service 29

Cases

Page

Eagle Indemnity Co. v. Cherry, 182 F. 2d 298 (5th Cir. 1950) 27

Fidelity & Deposit Co. v. Central State Bank, 12 S.W. 2d 611 (Tex. Civ. App. 1928) 26

First State Bank v. Metropolitan Casualty Ins. Co., 79 S.W. 2d 835 (Tex. 1935) 26

Fleming v. Van Der Loo, 160 F. 2d 906 (D.C. Cir. 1947) 17-18

Griffin v. Zuber, 113 S.W. 961 (Tex. Civ. App. 1908) 26

Gulf, Colorado & Santa Fe Railway Co. v. McBride, 322 S.W. 2d 492 (Tex. 1958) 16

Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co., 387 S.W. 2d 22 (Tex. 1965) 14

Liberty Insurance Company of Texas v. Rawls, 358 S.W. 2d 920 (Tex. Civ. App. 1962) 14

Luton Mining Co. v. Louisville & N.R. Co., 123 S.W. 2d 1055 (Ky. 1938) 16

Maryland Casualty Co. v. Moritz, 138 S.W. 2d 1095 (Tex. Civ. App. 1940, error refused by Texas Supreme Court) 14

Massachusetts Bonding & Ins. Co. v. Texas Finance Corp., 258 S.W. 250 (Tex. Civ. App. 1924, error dismissed by Texas Supreme Court) 26

Mitchell's, Inc. v. Friedman, 303 S.W. 2d 775 (Tex. 1957) 16

United States v. Pendergrast, 241 F. 2d 687 (4th Cir. 1957) 18

Rules of Procedure

Federal Rules of Civil Procedure, Rule 46 18

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1140

NATIONAL SURETY CORPORATION,
Petitioner,

v.

RAUSCHER, PIERCE & CO., INC.,
Respondent.

On Petition For A Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

There was no written opinion of the District Court in the present case. Its Findings of Fact and Conclusions of Law are printed as Appendix B to the Petition for Writ of Certiorari filed herein by National Surety Corporation ("National Surety"). The opinion of the Court of Appeals for the Fifth Circuit is reported at 369 F. 2d 572, and is printed as Appendix A to the Petition for Writ of Certiorari (the "Petition").

JURISDICTION

The date of the decree sought to be reviewed by National Surety is December 13, 1966, and the time of its entry was

December 13, 1966. A Motion for Rehearing filed by National Surety was overruled by the Court of Appeals for the Fifth Circuit on February 13, 1967.

The jurisdiction of the District Court was invoked by Respondent Rauscher, Pierce & Co., Inc. ("Rauscher, Pierce") under 28 U.S.C. § 1332 by reason of the diversity of citizenship of the parties. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1245(1).

STATEMENT

A brief statement is required, in our opinion, by several inaccuracies in the "General Statement" at pages 3 through 6 of the Petition. The opinion of the Court of Appeals (Petition, Appendix A, pages A-1 to A-13) contains a clear statement, and we deem it sufficient here merely to point out those inaccuracies in the Petitioner's Statement and in each instance to cite the evidence introduced in the trial court on the point, the pertinent Findings and Conclusions of the trial judge, and the opinion of the Court of Appeals.

1. At page 4 of the Petition, it is stated that Rauscher, Pierce "realized a net profit" on account of its purchase and sale of the Water District Bonds* to the Water Bond Purchasers.

(a) There is no evidence in the record of what the net profit of Rauscher, Pierce, if any, was in these 1957 transactions of purchasing and reselling the Water

* Hereinafter, Travis County, Texas Water Control & Improvement District No. 9 is referred to as the "Water District"; the bonds of the Water District, as the "Water District Bonds"; and Connecticut Mutual Life Insurance Company and The State Mutual Life Assurance Company of America, as the "Water Bond Purchasers," as in the opinion of the Court of Appeals.

District Bonds. There is merely a single sentence (R. 159) relating to the computation of a commission of an agent of Rauscher, Pierce in connection with such sales, based upon the profit of Rauscher, Pierce "*before overhead*," with no showing or inquiry as to what or how much overhead was involved. National Surety had nothing in its pleading about offsetting any loss by an item of profit, if any (R. 289).

(b) The Findings of Fact by the trial court on the "loss" of Rauscher, Pierce (R. 350) were not objected to in the trial court; there was no request for any findings as to any net profits which might offset any such loss (R. 294); and there were no findings as to any such net profits. Indeed, the objections of National Surety to the Findings of Fact suggested by Rauscher, Pierce on the amount of the loss were silent as to any contention that there were any "net profits" or any evidence of any (R. 324).

(c) National Surety, pointing out the single sentence in the record above mentioned, first urged the point in the Court of Appeals that there was a "net profit" and hence a setoff. That court, instead of declining to consider the contention for procedural reasons, as it could have, overruled the contention because it was immaterial as a matter of law (Petition, Appendix A, page A-11).

The record from the trial court accordingly remains clear that there was no issue about any "net profit" or indeed any evidence of any, and the opinion of the Court of Appeals

in no way supports the statement in the Petition that net profits in any amount were "realized."

2. In the last four lines of page 4 and the first twenty-four lines of page 5 of the Petition, National Surety seeks to create the impression that there is an inconsistency between the Original Complaint and the later Amended Complaints of Rauscher, Pierce as filed in the trial court. Words that were immaterial to the causes of action asserted by Rauscher, Pierce in its Original Complaint are quoted in italics (apparently for the sole purpose of casting doubt upon the propriety of the factual allegations presented for the first time in the First Amended Complaint, at which time a second and additional group of causes of action had been asserted for the first time). Theretofore three causes of action had been asserted in the Original Complaint, (i) for costs and attorneys' fees, (ii) for losses on purchases of Water District Bonds in compliance with the settlement agreements made with the Water Bond Purchasers, and (iii) for a declaratory judgment as to the right to recoup such losses when the amount each year is established, upon compliance year after year with requirements of the settlement agreements. All three causes of action in the Original Complaint were based on allegations of fraud by the Rauscher, Pierce employee Volz upon the Water Bond Purchasers. But in the light of a defense asserted by National Surety as to these original causes of action, Rauscher, Pierce amended its complaint, adding as a rebuttal to that defense and as a second and additional group of causes of action, for the same items of recovery, allegations of fraud by the said employee upon

Rauscher, Pierce.* These additional allegations are not inconsistent with any allegation necessary to recovery under the causes of action set forth in the Original Complaint. They constituted additional grounds for relief based on a supplemental check into voluminous records, all of which clearly showed indisputably that the transactions of purchase of the bonds were in three steps (by Tucker [the underwriter for the Water District]; next by Rauscher, Pierce from Tucker; and third by the Water Bond Purchasers from Rauscher, Pierce), and that the misrepresentations of Volz which were relied upon by the Water Bond Purchasers in making a commitment to buy from Rauscher, Pierce were also relied upon by Rauscher, Pierce in making its commitments to buy from Tucker and to resell the bonds, all such commitments having been made in advance of the issuance of the bonds or their acquisition by Tucker. All those allegations were important to the second and additional group of causes of action and unimportant to the first group of causes of action as asserted in the Original Complaint, which

* In view of the emphasis by National Surety in its Petition and in our brief in opposition thereto, on the differences between this first group of causes of action in the Original Complaint and the second group of causes of action asserted in the First Amended Complaint for the first time, this chronology in the trial court may aid to keep clear the contentions of the parties there: September, 1963, Original Complaint filed (R. 209); October, 1963, Motion to Dismiss it (R. 223); January, 1964, First Amended Complaint filed (R. 224); February, 1964, Order Denying Motion to Dismiss it (R. 251); May, 1964, Second Amended Complaint adding allegations about loss on purchase of second annual installment of bonds (R. 255); May, 1964, Stipulation of the parties covering a large pro-

was based upon the fraud of Volz upon the Water Bond Purchasers. These additional allegations were clearly established by evidence, Findings of the trial court, and the opinion of the Court of Appeals:

(a) In the amended complaints it was spelled out in more detail than required by the rules of pleading that the purchase by Rauscher, Pierce was effected only after it had commitments from the Water Bond Purchasers and that the representations by Volz were relied upon by Rauscher, Pierce in making the commitments for purchase and resales and in later effecting the purchase and resales (R. 228-29, 259-60). The evidence supported these allegations in detail. The Rauscher, Pierce employee, Volz, having authority to investigate and make recommendations but not to commit the company (R. 136, 138, 143), drafted the proposed offering circular for the bonds and in January 1957 enthusiastically recommended that they be acquired (R. 141-43). Thereupon Rauscher, Pierce gave a written commitment to Tucker, who expected to purchase the bonds from the Water District, to purchase them from Tucker, this expressly being a conditional commitment depending upon a legal opinion that mandatory steps, required to be taken before the bonds could be validly issued and sold, were taken (R. 144-46). Volz then forwarded to the Water Bond Purchasers the offering circulars and his explanatory letters containing his misrepresentations, and commitments to purchase from Rauscher, Pierce were obtained from the Water Bond Purchasers before the end of February (Exhibits 9, 12, 18). Steps

to be taken by the District before the Water District Bonds could be legally issued, were taken on later dates than this, almost all in March 1957 (Exhibits 29, 31, 32, 33, 35, 37, 38, 39 and 40). On the date of the last of these steps, March 22, 1957, the bonds were issued and sold by the Water District to Tucker (Exhibits 41, 42 and 43). Sales were thereupon made by Tucker to Rauscher, Pierce, also on March 22, 1957 (Exhibits 44 and 45). Thereafter, the purchase was effected by State Mutual from Rauscher, Pierce in May 1957 (Exhibits 21 and 22) and by Connecticut Mutual in August 1957 (Exhibits 14 and 15), all in accordance with the commitments made by these purchasers in February to Rauscher, Pierce. The offering circular accompanying the Volz letters contained the words that Rauscher, Pierce did offer in January the bonds which "we own and offer" * * * "when issued." All of the documents and testimony mentioned demonstrated without contradiction the truth of the new allegations in the amended complaint, as to these additional causes of action.

(b) Thereupon, at the conclusion of the trial the District Court rendered judgment for Rauscher, Pierce with Findings accepting and establishing both the original causes of action and the additional causes of action (as detailed in Section 3 of this Statement, *infra*).

(c) The Court of Appeals in its opinion expressly approved the conclusions of the trial court on each of the two groups of causes of action (see Section 3 of this Statement, *infra*).

3. On pages 5 and 6 of its Petition, National Surety states that the trial court rendered judgment against it on the original causes of action asserted and rejected the additional causes of action, whereas the Court of Appeals (so National Surety argues) has affirmed the case on the second group of causes of action allegedly rejected by the trial court (gratuitously adding that these additional causes of action were without evidence to support them, an assertion demonstrated to be erroneous by our presentation under Section 2 of this Statement, *supra*). The record from the trial court and the opinion of the Court of Appeals are both clear to the effect that the plaintiff was entitled to recover under each of the two groups of causes of action:

AS TO THE FIRST CAUSES OF ACTION

(a) The averments in the Complaint in the District Court (R. 265) alleged the charges of fraud by Volz which the earlier complaints of the Water Bond Purchasers had made. Copies of those earlier Complaints against Rauscher, Pierce (Exhibits 53, 54 and 73), alleging claims which if established would constitute a loss covered by fidelity provision "A" of the Brokers Blanket Bond, were admitted into evidence by stipulation (Exhibt 1). The opinion of the Court of Appeals quotes the provisions of the National Surety bond and the allegations of those Complaints by the Water Bond Purchasers (Petition, Appendix A, page A-2, ftn. 1 and pages A-5 to A-7, ftn. 3). The allegations of Rauscher, Pierce that National Surety was tendered defense of Water Bond Purchasers' suits (R. 264) were admitted

to be true (R. 289), and the evidence showed that this tender was a continuous one throughout the litigation with the insurance companies and until the settlement with them was consummated (Exhibits 57, 58, 60, 62, 71, 74 and 72, all admitted in evidence by stipulation, Exhibit 1). The settlement agreements of Rauscher, Pierce with the Water Bond Purchasers were introduced into evidence (Exhibits 75 and 76), again by stipulation, and the evidence that those settlements were reasonable and prudent and entered into in good faith was undisputed (R. 110-11). The allegations of loss and of court costs and attorneys' fees (R. 273-77) were supported fully by evidence (R. 21-38, 190-205 and 111-18) justifying a larger recovery than given by the trial court.

(b) The Findings of the trial court were explicit that National Surety, though obligated so to do (R. 345), declined to defend (R. 348), and though it had an opportunity to determine whether the settlements should be entered into, declined to do this (R. 349); further, that both settlement agreements were reasonably and prudently entered into (R. 349) and that the losses on which a judgment was entered were sustained (R. 351).

(c) The Court of Appeals in its opinion confirmed all of such Findings of the trial court (Petition, Appendix A, pages A-5 through A-9).

AS TO THE ADDITIONAL CAUSES OF ACTION

(a) The evidence which shows that the additional allegations under these causes of action first asserted in the first amended complaint, were fully established has been reviewed under Section 2, *supra*.

(b) The Findings of Fact of the trial court were explicit that the purchase of Rauscher, Pierce was made in reliance on information furnished it by Volz (R. 347); that the suits against Rauscher, Pierce were based on misrepresentations by Volz (R. 348); and that after National Surety declined to defend, counsel for Rauscher, Pierce proceeded with discovery depositions and in such connection found papers in the file of Mr. Volz "that led counsel to believe and to advise the plaintiff that it was in jeopardy of judgment" (R. 348-49), whereupon the suits were compromised. All of the Findings under the first causes of action, in addition to these, were of course pertinent to the second causes of action.

(c) The Court of Appeals affirmed the judgment of the trial court based on these second causes of action also (Petition, Appendix A, pages A-9 through A-10). Specifically, the court found that the proof was "directed pointedly" to the conclusion that Rauscher, Pierce was defrauded by Volz, and it referred to such proof as "quite ample" (page A-10).

As we read the Petition of National Surety, it proceeds on the theory that the Court of Appeals acted solely on the second group of causes of action, and the Petition addresses itself only to recovery based on the fraudulent representations of Volz to Rauscher, Pierce, his employer.

ARGUMENT

I.

The Decision Of The Court Of Appeals Is Clearly Correct On Grounds Wholly Unrelated To The Points Sought To Be Raised By The Petition For Writ of Certiorari

The judgment of the District Court in favor of Rauscher, Pierce had three separate components: (i) an award of attorneys' fees and Court costs incurred and paid by Rauscher, Pierce in defense of the Water Bond Purchasers' lawsuits; (ii) an award of the amount of loss suffered by Rauscher, Pierce because of its required purchases of the first two installments of Water District Bonds from the Water Bond Purchasers under the settlement agreements with them; and (iii) a declaratory judgment that Rauscher, Pierce is entitled to recover any loss suffered by it because of future purchases of installments of Water District Bonds under those settlement agreements.

Each portion of that District Court judgment was based upon two separate bases for recovery presented by Rauscher, Pierce in its pleadings before the District Court, and was affirmed by the Court of Appeals on the basis of both of those theories. The points sought to be raised by National Surety in its Petition for Writ of Certiorari concern only the sufficiency of the Findings of Fact by the District Court, and the sufficiency of the evidence to support those Findings, with regard to only one of these, referred to in our Statement as the second group of causes of action. The Petition does not attack the legal correctness as a basis of recovery of the grounds asserted in the first group of causes

of action nor the sufficiency of the Findings of Fact or evidence to support the recovery to which Rauscher, Pierce has been held entitled on this group of causes of action, based upon fraud on the Water Bond Purchasers, perpetrated by Volz, the employee of Rauscher, Pierce. In addition, the decision of the Court of Appeals upon National Surety's "profits realized" point (Point 3 in its Petition) was clearly correct upon grounds which that Court did not reach in its opinion, but which were presented to it by Rauscher, Pierce by brief and oral argument.

Therefore, a Writ of Certiorari should not be granted in this case, because this Court, if it considered the merits of the case, would likely affrm the decision of the Court of Appeals without reaching the points of alleged error presented by the Petition for Writ of Certiorari.

A. ***The Court of Appeals' Affirmance of the Award of Attorneys' Fees and Court Costs Was Clearly Correct, and Is Unchallenged by the Petition for Writ of Certiorari.***

National Surety's points (1) and (2) concern only whether or not there were Findings and evidence to support Findings that Rauscher, Pierce relied upon the misrepresentations by Volz. These points do not in any way concern the correctness of the District Court's award of attorneys' fees and Court costs. That award, simply, is unchallenged by the Petition for Writ of Certiorari.

The Broker's Blanket Bond upon which Rauscher, Pierce sued National Surety provides that National Surety will indemnify it against Court costs and reasonable attorneys' fees incurred and paid "in defending any suit or legal pro-

ceeding brought against the Insured to enforce the Insured's liability or alleged liability on account of any loss, claim or damage which, if established against the Insured, would constitute a valid and collectible loss sustained by the Insured under the terms of this Bond . . . ." (R. 330-31; Exhibit 3.) The District Court found (R. 348) that the complaints filed by the Water Bond Purchasers against Rauscher, Pierce sought recovery.

> "because of the material misrepresentations made by Volz to . . . [them] in disregard of their truth or falsity and as to the omission of relevant and material facts in connection therewith."

The material allegations of those complaints are set forth in footnote 3 to the opinion of the Court of Appeals. (Petition, Appendix A, pages A-5 through A-7.) In effect, those complaints alleged that Rauscher, Pierce's employee Volz made misrepresentations to the purchasers which he knew or should have known were false and misleading or (alternatively) which he made with reckless disregard of their truth or falsity. The complaints then alleged that Rauscher, Pierce, as Volz' employer, was responsible for his alleged actions. If the Water Bond Purchasers had established the truth of those allegations, and recovered from Rauscher, Pierce by reason of its vicarious liability, Rauscher, Pierce would have suffered a loss by reason of a "dishonest, fradulent or criminal act" of one of its employees.

Upon consideration of those allegations and the Findings of the District Court, the Court of Appeals held that

> "It is clear from the face of the complaints filed by the Water Bond Purchasers that the alleged misconduct was

> sufficient to bring the suit within coverage of the indemnity bonds." (Petition, Appendix A, page A-5.)

Under Texas law, National Surety's duty to defend the Water Bond Purchasers' suits or to indemnify Rauscher, Pierce for the costs of those defenses, is to be judged solely by the allegations of the complaints filed by the Water Bond Purchasers. It does not matter that other causes of action were alleged by the Water Bond Purchasers against Rauscher, Pierce which may not have been covered by the Bond, and it would not have mattered even if the allegations of Volz' fraud had been wholly groundless. The Supreme Court of Texas, in *Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*, 387 S.W. 2d 22, 24 (1965), held:

> "We think that in determining the duty of a liability insurance company to defend a lawsuit the allegations of the complainant should be considered in the light of the policy provisions without reference to the truth or falsity of such allegations and without reference to what the parties know or believe the true facts to be, or without reference to a legal determination thereof."

See also, *Maryland Casualty Co. v. Moritz*, 138 S.W. 2d 1095 (Tex. Civ. App. 1940, error refused by Texas Supreme Court); *Liberty Insurance Company of Texas v. Rawls*, 358 S.W. 2d 920, 928 (Tex. Civ. App. 1962).

B. *The Court of Appeals Was Correct in Affirming the District Court's Award of Rauscher, Pierce's Losses and in Affirming the Declaratory Judgment Awarded, on the Basis of Its First Group of Causes of Action, Which Is Unchallenged by the Petition for Writ of Certiorari.*

Throughout the present litigation, Rauscher, Pierce has urged as its first bases for causes of action that, upon

National Surety's repeated refusal to assume the defenses of the Water Bond Purchasers' actions or to participate in any way in those defenses or in consideration of whether or not those lawsuits should be settled, it had the right in good faith to make a settlement which was reasonable and prudent and which was binding upon National Surety.

The facts before the District Court were undisputed. The settlement agreements with the Water Bond Purchasers were made upon advice of Rauscher, Pierce's counsel, who after discovery proceedings had been completed in the Water Bond Purchasers' litigation concluded that there was a substantial hazard of a finding that there had been actual fraud practiced by Volz and who based his recommendation to Rauscher, Pierce that it settle upon the danger of such an adverse finding; at no time was Raushcer, Pierce willing to consider settlement of those lawsuits upon the basis of a danger of liability without fault. (R. 95-99.)

The District Court found that the settlement agreements were entered into "upon advice of counsel" and that both were "reasonably and prudently entered into." (R. 349.)

The Opinion of the Court of Appeals makes clear that it affirmed the District Court's judgment upon the basis of these first causes of action of Rauscher Pierce, as well as upon the basis of Rauscher, Pierce's additional causes of action which are attacked by the Petition for Writ of Certiorari. As the Court of Appeals put the matter (Petition, Appendix A, pages A-8 and A-9):

> "But with coverage denied and the demand for defense rejected, the standard was one of taking that action

> which a prudent uninsured security dealer would have taken. That course might lead to defense to the bitter end or defense for awhile and compromise as the exigencies suggested . . . . At any rate, Rauscher, Pierce invited National Surety to take over settlement negotiations and to pass on proposed alternative settlements. But this, too, was met with a refusal. The wisdom and the prudence of the settlement simply is not challenged."

Rauscher, Pierce's recovery on its first causes of action, sustained by the District Court and affirmed by the Court of Appeals, is solidly based on clear holdings of the Supreme Court of Texas. That Court, in *Gulf, Colorado & Santa Fe Railway Co. v. McBride*, 322 S.W. 2d 492 (1958), established the following rule of law: If the indemnitee notifies the indemnitor of the claim against it, and calls upon the indemnitor to defend the claim, and if the indemnitor refuses to do this the indemnitee has the right to make a reasonable settlement in good faith. If the allegations of the claim were such as to require the indemnitor to defend it, the indemnitor must pay any loss resulting from such a settlement after the indemnitee shows "that it made the settlement . . . in good faith, and that it was a reasonable and prudent settlement." *Accord: Mitchell's, Inc. v. Friedman*, 303 S.W. 2d 775 (Tex. 1957); *Luton Mining Co. v. Louisville & N.R. Co.*, 123 S.W. 2d 1055 (Ky. 1938) (cited with approval in *Gulf Colorado & Santa Fe Railway Co. v. McBride*, 322 S.W. 2d at 495-496).

C. *The Decision of the Court of Appeals in Overruling National Surety's "Net Profits" Point Was Correct on Grounds Which That Court Did Not Reach.*

By point (3) in the Petition for Writ of Certiorari in this case, National Surety seeks to attack the holding of the

Court of Appeals that Rauscher, Pierce is entitled to recover from National Surety, as a part of its loss under the Broker's Blanket Bond, any profit it might have realized in the sales to the Water Bond Purchasers but for Volz' alleged misrepresentations. National Surety's point, apparently, is that the Court of Appeals' decision was incorrect as a matter of Texas law. As we shall make clear later in this brief, we believe National Surety's view of Texas law is wholly incorrect, but before that we wish to point out that the Court of Appeals' decision on this question was correct on two other separate grounds, presented to it but which it did not reach in its consideration of the case. Each of those other grounds would likely lead this Court to affirm the Court of Appeals' decision without reaching the alleged conflict between that decision and applicable Texas law.

First, National Surety never in any manner presented to the District Court the proposition that the loss to Rauscher, Pierce should be offset by the amount of any alleged prior "profit". (See Section 1 of "Statement," *supra* p. 3.) This question of setoff was raised for the first time by National Surety in its brief to the Court of Appeals.

The more convincing authorities on the matter hold that an issue of fact or law must be presented in some manner to the trial court before it may properly be presented on appeal.

> "While it was not necessary that he request a finding [under Rule 52(a)], it was necessary that he make known to the court his objection to the action taken by it and state the grounds of the objection. If the Administrator had any objection to the findings an-

> nounced by the District Court, such objection should have been registered with that court."

Fleming v. Van Der Loo, 160 F. 2d 906, 909-10 (D.C. Cir. 1947); see also, *United States v. Pendergrast*, 241 F. 2d 687 (4th Cir. 1957). It is a matter of simple justice that a party ought to make known to the trial court and to its adversary the action it desires taken or the reason why it believes some action should not be taken, so that the trial court may have an opportunity to consider the party's point before reaching a decision and so that the adversary may have an opportunity to present evidence and arguments directed to the point. This principle is also emphasized in Rule 46 of the Federal Rules of Civil Procedure, which, while making formal exceptions to rulings or orders unnecessary, requires that a party make known "to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor . . ."

Secondly, there was simply no evidence in the record before the Court of Appeals that there was any "net profit" to Rauscher, Pierce in connection with the transaction. The Petitioner herein relies upon a single sentence of a witness, in which he refers to how he computed payments of commissions to salesmen in 1957 by referring to a "profit before overhead." This passing reference, not called to the attention of the District Court and never developed in the evidence before the District Court by either party, cannot by any stretch of imagination be converted into evidence of what in mid-1957 were the "net profits" of Rauscher, Pierce,

what offsetting items then existed to diminish or eliminate that figure, and what items of expense or overhead with reference to the Water District Bonds had arisen from mid-1957 until the trial of the case in the District Court to diminish or eliminate that figure. Further, in the words of the Court of Appeals (Petition, Appendix A, page A-9), there had been "the great drop in market value of the bonds (about 60) in 1961 in contrast to 1957." The reasons for this marked diminution in value were wholly unrelated to Volz' conduct, were amply set forth in the record before the District Court, and were undisputed. Only confusion results from comparing an alleged 1957 "net profit," not reflected in the record, with the situation as it existed in 1961 and after. In brief, there is no evidence in the record of any "net profit" to Rauscher, Pierce, and the silence of the record is attributable solely to the failure of National Surety (the party with the burden of showing any setoff) to present it to the District Court.

II.

The Decision Of The Court Of Appeals Was Correct Upon The Additional Grounds Upon Which It Relied And Which Are Attacked By The Petition For Writ Of Certiorari.

A. *Contrary to Petitioner's Points 1 and 2, There Were Findings of Fact In the District Court to Support the Decision of the Court of Appeals, and Those Findings Were Supported By Ample Evidence In the Record, on the Question of Loss Suffered by Rauscher, Pierce as the Result of Fraudulent Representations to it by Volz.*

As has been pointed out above, Petitioner's points 1 and 2 do not attack the correctness of the Court of Ap-

peals' affirmance of the District Court's award of attorneys' fees and Court costs to Rauscher, Pierce. Further, those points do not raise any question of the correctness of the Court of Appeals' decision on the first group of causes of action relied upon by Rauscher, Pierce. Rather, Petitioner's points involve only construction of Findings of Fact, and of evidence to support those Findings, relating to Rauscher, Pierce's recovery on its second group of causes of action, arising out of fraudulent misrepresentations to it by Volz.

The additional facts fundamental to these causes of action are that Rauscher, Pierce relied upon the same alleged misrepresentations as did the Water Bond Purchasers, when it determined to commit itself conditionally to purchase the Water District Bonds and again later when it concluded the purchase of the bonds from Tucker and their resale.

The Court of Appeals held that National Surety was wrong in asserting that this additional basis for recovery "was not before the Court or passed on by it." (Petition, Appendix A, page A-10.) First, the District Court found that:

> "The bonds were issued by the District and acquired by the plaintiff from Tucker [the underwriter for the Water District] about March, 1957. After they were issued to Tucker they were immediately turned over to the plaintiff, Rauscher, Pierce.
>
> "Rauscher, Pierce concluded a sale of a portion of these bonds to the State Mutual Insurance Company about the 29th of May, 1957, and to the Connecticut Mutual by delivery and payment by Connecticut Mutual on August 5, 1957." (R. 347-48.)

The fair construction of these Findings is that of the Court of Appeals, that is, that Rauscher, Pierce did not own the Water District Bonds, and was not unconditionally committed to purchase them, when the Water Bond Purchasers committed themselves to buy during mid-February, 1957. Secondly, there is this unequivocal finding of fact by the District Court (R. 347):

> "The plaintiff, Rauscher, Pierce and Company, had a long-time employee, one Volz, who investigated matters and helped in making purchases and sales of bonds. He appears to have had the absolute confidence of his employers for a number of years: He is now dead. He was furnished by Tucker a report of the engineer and a lot of data touching the makeup of the Water District, of its assets and probable financial ability to meet its obligations. Volz wrote letters and furnished the engineer's report that had been made up for Tucker or under his supervision and that of the District, and *it was upon this information and the information received by Volz in examining the property, the acreage, number of inhabitants, etc., that the purchase was made.*" (Emphasis supplied.)

Petitioner has difficulty in explaining away this Finding of Fact by the District Court and can say no more than it is a "mere random statement." (Petition, page 8.) Petitioner's difficulty, obviously, is simply that it does not wish to accept the correctness of a Finding that Rauscher, Pierce relied upon the representations by Volz when negotiations were conducted for its purchase of the bonds and their resale, and later when it was purchasing and reselling them.

The Court of Appeals, in discussing Rauscher, Pierce's second group of causes of action, commented that:

> "[T]he proof was directed pointedly this way. And it was quite ample." (Petition, Appendix A, page A-10.)

In fact, the evidence in the record supporting these Findings of Fact by the District Court is so ample that, in this Brief, we may only give a short summary of it. That evidence conclusively shows that Volz was charged with the responsibility to investigate and make recommendations to his employer with regard to the Water District (R. 138, 143); that Volz visited the District several times and talked with the engineer and the underwriter for the District (R. 141); that the preliminary draft of offering circular containing the misrepresentations was prepared under the direction of Volz and he gave a copy of it (along with a copy of the engineer's report containing misrepresentations) to Arnold J. Kocurek, the Rauscher, Pierce officer charged with deciding whether or not to purchase the Bonds (R. 141-42); that Volz represented to Kocurek that the statements in the draft of offering circular were true and that Kocurek would not have committed the company to buy the bonds without the representations and recommendations made to him by Volz (R. 165, 169); and that when Kocurek made the final decision to waive the conditions to Rauscher, Pierce's commitment to purchase the Water District Bonds, he talked to Volz, relied upon Volz and his recommendations and representations, and without those representations and recommendations by Volz would not have gone forward with the

purchase (R. 152, 153, 165). Thus, the misrepresentations alleged to have been made to the Water Bond Purchasers by Volz were shown by the evidence to have been made equally to Rauscher, Pierce by Volz and to have been relied upon by it.

With regard to the conditional nature of Rauscher, Pierce's commitment to purchase the Water District Bonds from the underwriter for the Water District, the evidence is equally conclusive. Arnold J. Kocurek testified before the District Court that on January 31, 1957, he made a conditional commitment for Rauscher, Pierce to purchase the issue from the underwriter "when acquired and only if acquired by Tucker." (R. 147-148.) The commitment to purchase was conditional upon the legal and proper issue of the bonds, and the receipt by Rauscher, Pierce of an opinion of legality of issue from a Dallas, Texas, law firm. (R. 144-46, 149.) That opinion was required, in addition to the expected opinion of an Austin, Texas, law firm which was counsel for the Water District, because Rauscher, Pierce anticipated that it would be required by prospective purchasers. (R. 144-45.)

The commitments to purchase by the Water Bond Purchasers were made in mid-February, 1957. Before the Water District Bonds could be legally issued, a number of required steps had to be taken, and were taken, all after the January 31, 1957, conditional commitment to purchase by Rauscher, Pierce and all after the commitments of February, 1957, by the Water Bond Purchasers. Some of these required steps were the following: The Water District's

Amendatory Bond Order (Ex. 29); Resolution of the Board of Water Engineers of the State of Texas (Ex. 31); Non-Litigation Certificate by the State District Clerk (Ex. 33); Boundary Correction Order by the Water District (Ex. 35); the District's Boundary Certificate (Ex. 36); Waiver of Option to Purchase by the State Board of Education of Texas (Ex. 37); Opinion of the Attorney General of the State of Texas (Ex. 38); Registration of the Bonds by the Comptroller of the State of Texas (Ex. 39); and Opinion by the Attorneys for the Water District (Ex. 40). Until each of these steps, and others reflected in the record, had been taken, Rauscher, Pierce's commitment to purchase the bonds from the underwriter remained unconditional. Most importantly, that commitment remained conditional until Rauscher, Pierce consciously waived its requirement that it receive the opinion of the Dallas law firm. Arnold J. Kocurek intentionally waived that requirement, and determined to go forward with the purchase in late March, 1957, because he was sure that the opinion would be received very soon. (R. 152-53, 180.) The only item of purported evidence which Petitioner has pointed to, which might lead a Court to believe that the January commitment of Rauscher, Pierce was unconditional, is the letter of January 31, 1961, from Kocurek to the underwriter (Ex. 25) which is quoted in part on page 11 of the Petition for Writ of Certiorari. However, Mr. Kocurek's testimony in the District Court was uncontradicted to the effect that in the securities trade an agreement to purchase on "when issued" conditions is referred to as a "purchase" and an agreement to so sell is referred to as a "sale." (R. 178-79.)

Thus, the Court of Appeals was clearly correct in determining that the District Court had made Findings of Fact on the issues in question, and that those Findings were amply supported by all this evidence in the record.

B. *There Is No Conflict Between the Decision of the Court of Appeals and the Law of the State of Texas.*

By its Point (3) National Surety in its Petition for Writ of Certiorari has sought to establish a conflict between the Court of Appeals' holding, that a loss of profits is a "loss" to the insured under a Broker's Blanket Bond, and the law of the State of Texas. Again, this point has no bearing on the question whether or not the Court of Appeals was correct in affirming the District Court's award of attorneys' fees and Court costs to Rauscher, Pierce, and it can have no bearing upon the correctness of that Court's affirmance of the declaratory judgment for future losses granted by the District Court.

Petitioner refers the Court to authorities with regard to Texas law which are wholly inapplicable to the present case. Those authorities involve the appropriate measure of damage under Texas law in a case involving an action for fraudulent misrepresentation brought by the party defrauded against the person who made the misrepresentations. The present case is one involving construction of an indemnity bond, which provides that National Surety will pay Rauscher, Pierce for "any loss through any dishonest, fraudulent or criminal act of ony of the Employees . . . ." Thus, the question in this case is not that of the measure of damage

in a fraud action, but the question of the meaning and construction of the words "any loss" in the Broker's Blanket Bond.

On the matter of construction of these words of the bond, Texas law amply upholds the decision of the Court of Appeals. We begin, as did that Court, with the well established Texas rule that doubts in regard to the construction of a fidelity bond must be resolved against the surety. *First State Bank v. Metropolitan Casualty Ins. Co.*, 79 S.W. 2d 835, 840 (Tex. 1935); *Massachusetts Bonding & Ins. Co. v. Texas Finance Corp.*, 258 S.W. 250, 252 (Tex. Civ. App. 1924, error dismissed by Texas Supreme Court); *Fidelity & Deposit Co. v. Central State Bank*, 12 S.W. 2d 611, 613 (Tex. Civ. App. 1928). The reason for this rule of construction, as stated by the Texas Court of Civil Appeals in 1908, is that the

> "company is engaged in the business of making such contracts of indemnity for a consideration, and that it prepared the obligation and selected the language used," *Griffin v. Zuber*, 113 S.W. 961, 963.

"Loss" is not a word of precise meaning, but the Court of Appeals, correctly in our view, pointed out that when a businessman is required to pay over money to a third party, he loses assets, and he is not interested in whether or not those assets were generated by "profits" sometime in the past—they no doubt were. The payment of his money is a "loss" in a very real sense, and to construe the Broker's Blanket Bond otherwise would be to render its proffered protection illusory. The only case applying Texas law which has involved a determination of whether or not loss of

profits is a loss within the meaning of a fidelity bond, which we have found, is *Eagle Indemnity Co. v. Cherry*, 182 F. 2d 298 (5th Cir. 1950) (affirming a judgment of the United States District Court for the Northern District of Texas, Dallas Division, sitting in diversity). There the Fifth Circuit held that the fidelity bond protected the employer against a loss of profits which it could have earned had its employee not acted in a disloyal manner. The Court of Appeals in this case correctly followed its prior decision in the *Eagle Indemnity* case, thereby avoiding any conflict of authorities.

III.

The Matters Raised By Petitioner's Points, If Reached By This Court On The Merits, Are Of No Importance Beyond The Present Litigation And Are Essentially Matters Of Fact.

We feel certain that this Court, in considering the foregoing arguments that the decision of the Court of Appeals was correct both with and without regard to the points raised by the Petition for Writ of Certiorari, will have noticed the paucity of legal questions involved in the matters raised by the Petition, the unimportance beyond this litigation of the one legal principal presented by Petitioner, and that the Petition presents primarily questions of fact without any application beyond the present cause.

There is no constitutional principle, involving the Federal Constitution or any state constitution, important or unimportant, presented by the Petition for consideration. There is no question of Federal statutory law, important or unimportant, presented by the points Petitioner makes. There

is no question of state statutory law, important or unimportant, presented. The only legal question raised concerns the state of case law in Texas with regard to the proper construction of the words "any loss" in a fidelity bond. That question, if it becomes important to any other litigants, would be important to only a few in number, and is not of sufficient importance to justify this Court considering the matter on its merits.

The balance of the points presented by the Petition have no application or importance beyond this litigation. They involve merely the proper construction of specific Findings of Fact by a District Court and whether or not those Findings are supported by evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

/s/ PAUL CARRINGTON

PAUL CARRINGTON,

/s/ FLETCHER L. YARBROUGH

FLETCHER L. YARBROUGH,
Attorneys for Respondent.

CARRINGTON, JOHNSON & STEPHENS,
1900 Mercantile Dallas Building,
Dallas, Texas 75201,
Of Counsel.

April 6, 1967

CERTIFICATE OF SERVICE

The undersigned, counsel of record herein for Respondent Rauscher, Pierce & Co., Inc., does certify that service of the above and foregoing Brief for Respondent in Opposition to Petition for a Writ of Certiorari, was this day accomplished pursuant to Rule 33 (1) of the Rules of this Court by depositing 4 copies of same in a United States Post Office mail box, with first class postage prepaid, by certified mail with return receipt requested, addressed to Lloyd E. Elliott, counsel of record herein for Petitioner National Surety Corporation, at his post office address of record herein.

April 6, 1967

/s/ PAUL CARRINGTON

PAUL CARRINGTON,
Counsel for Respondent.